IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 367 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KUNVARGIRI HIRAGIRI GOSAI

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Revision Application No. 367 of 2000
MR NAGIN N GANDHI for Petitioner No. 1
MR BY MANKAD PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 17/09/2001

ORAL JUDGEMENT

#. This Criminal Revision Application is filed by

accused of Criminal Case No.96/1988 decided by learned JMFC, Talaja and the present petitioner was convicted under Section 279, 304(C) of Indian Penal Code and under Sections 112 and 116 of Motor Vehicles Act, an appeal came to be filed by the present petitioner before the learned Additional Sessions Judge, Bhavnagar being Criminal Appeal No.25/1991 which also came to be rejected by learned Additional Sessions Judge vide his order dated 19.8.2000 and hence this Revision Application against the order of conviction of the present petitioner by the learned JMFC and learned Additional Sessions Judge, Bhavnagar.

#. As per the brief facts of the case the incident occurred on 15.2.1988 and complaint in this case is given by one Hipabhai Ranchhodbhai before the Police Sub Inspector, Talaja on 15.2.1988. Accordingly, complainant Hipabhai Ranchhodbhai, resident of village Hajipara, Taluka - Talaja, District Bhavnagar, on the day of accident on 15.2.1988 he went to Talaja and returned to Hajipara at about 12 hours in the morning. He had boarded the bus from Talaja, there is Bus Stop on the road for getting down for the Hajipara village. At about 4:30 in the afternoon the complainant got down from the bus on road near Hajipara Bus Stand, on Mahuva to Talaja road in which the complainant was travelling from north to south road. Mahuva is situated at northern direction while Talaja is situated at southern direction. Bus was travelling from Talaja from southern direction to northern direction. The Bus Stop of Hajipara village is situated on eastern side of the road while the village Hajipara is situated at western side of the said road. Meaning thereby that the passenger getting down at Hajipara from the bus for going to Hajipara village will have to cross the road from eastern direction to western direction. The complainant had at the relevant time got down from the bus. He saw that his son Kanji was at Bus Stand to see off some guest who were to board the same bus from which the complainant got down. Alongwith Kanji, his son and grandson of complainant, Mukesh aged 5 years was also there on the Bus Stand. After getting down from the Bus they started to walk towards village Hajipara, that is towards western direction from eastern direction, seeing this his grand son Mukesh came after complainant. At that very juncture on the road one oil tanker of red colour came from southern direction of the road with excessive speed rashly and negligently. While Mukesh was crossing the road, it hit Mukesh from right side of the bumper of the oil tanker, and on shouting, the driver of the tanker stopped the tanker. Mukesh was badly injured on his right leg and on his left leg. He

became unconscious and, therefore, Mukesh was transferred to Government Hospital, Talaja, in the same tanker, where Mukesh died. As per the prosecution case the concerned tanker bearing No.GTK-4588 was driven by the present petitioner at the relevant time. According to medical opinion Mukesh died because of cardio respiratory failure due to injury on vital organ like lungs and heart. The postmortem note is placed at Ex.38 and 39 in Criminal Case No.96 of 1988. The present petitioner was charge sheeted for the offences punishable under Section 279 and 304(A) of the Indian Penal Code and for the offences punishable under Sections 112 and 116 of the Motor Vehicle Act. The present petitioner pleaded not guilty and trial was proceeded. Complainant Hipabhai was examined as PW No.1 at Ex.4, the complaint is at Ex.5, PW No.2 Kanjibhai who is also an eye witness and son of complainant is examined at Ex.6. Dr.Mahendra, who performed postmortem has been examined at Ex.8. Postmortem note is placed at Ex.9, Panchnama of scene of offence is produced at Ex.11, Panchnama of the tanker is produced at Ex.13, inquest panchnama is produced at Ex.17. Investigating officer was also examined vide Ex.21. Accident report was also produced on record. After hearing parties learned JMFC, Talaja convicted the present accused vide his judgment dated 16.5.1991 and sentenced the present petitioner for simple imprisonment of 3 months and Rs.1,000/- as fine for the offence proved under Section 304-A of the Indian Penal Code. The present petitioner was sentenced for 3 months simple imprisonment and Rs.1,000/- of fine for the offences under Section 279 of the Indian Penal Code. It was also ordered that if the amount of fine is recovered from the present petitioner the same be paid to complainant Hipabhai as compensation. No separate order for Sections 112 and 116 of the Motor Vehicle Act, was passed by the learned JMFC. After relying on deposition of two eye witnesses as PW No.1 Hipabhai and his son PW No.2 Kanjibhai and after taking into consideration the report of the accident produced by RTO Inspector at Ex.21 that the hand brake was disconnected, the learned Magistrate came to the conclusion that the prosecution was able to prove the case of negligence against the present petitioner and that the accident had occurred only due to rash and negligent driving of the said tanker by the present applicant petitioner. Learned Appellate Judge endorsed the view of the learned JMFC that eye witnesses Hipabhai at Ex.4 and Kanjibhai at Ex.6 amply proved that the accident had occurred due to rash and negligent act of the present applicant and thereby due to accidental injury, victim Mukesh died. The order of confirming the order of learned Judicial Magistrate First Class

convicting the petitioner by the learned Appellate Judge is impugned in this revision.

#. Learned advocate Mr.N.N.Gandhi, for the applicant - original accused and learned APP Mr.B.Y.Mankad were heard at length.

#. Learned advocate Mr.N.N.Gandhi, has drawn my attention to the panchnama which is at Ex.11. Though this panchnama is not proved by the prosecution because the panchas are hostile. Learned advocate Mr.Gandhi relying on the panchnama has argued that the road was wide 23 ft. and the accident has occurred in the middle of the road. Learned advocate Mr.Gandhi drawn my attention to eye witness PW No.1 Hipabhai at Ex.3 who has stated that Mukesh tried to come with Hipabhai, there was a crowd and due to that he was struck by the tanker. It was vehemently stated that the accident occurred behind the bus about 6 ft. to 8 ft. It was urged that from the back of bus immediately after 6 ft. to 8 ft. this complainant was trying to cross the road, while Mukesh was attending to go to his grandfather and to cross the road. It was also urged that from the deposition of eye witnesses, witness - complainant Hipabhai, it is clear that Mukesh was not escorted properly either by his father Kanjibhai or his grand father Hipabhai. It was urged that Hipabhai has admitted that after the accident the tanker involved in the accident could stop at 6 ft. to 8 ft. from the spot of the accident. It was also urged that, therefore, in fact, the tanker was not in speed. It was also urged that the bus at that time was at the Bus Stand and was about to start, on the eastern side of the road. Distance between the bus and tanker were passing and crossing on opposite direction of the road was hardly about 1 or 2 feet. It was urged that, even if, we consider the deposition of both the eye witnesses, there was no rash and negligence on the part of the present applicant in the accident. The fact mentioned in the panchnama and narrated by these two eye witnesses PW No.1 and PW No.2 denotes that there was unfortunate accident pure and simple when no negligence can be attributed to the present applicant. It is urged that the bus was standing at the Bus Stand and was about to start as per the deposition of PW No.1 and PW No.2. The distance between the bus and tanker, when the tanker was crossing the bus, was about couple of feet. The tanker could stop at far 6 ft. from the spot of accident as admitted by the witnesses denotes that the driver of the tanker i.e. present applicant took enough care to drive the vehicle. However, when this boy of aged 5 years tried to cross and was not escorted properly, was

struck by the tanker and at that juncture, it is quite natural that heavy vehicle like tanker could not be stopped immediately at the spot and hence it was urged that both the Courts below could not appreciate these circumstances in evidence properly and conviction was the result. The rashness and negligent driving will have to be proved by the prosecution beyond reasonable doubt. In this case according to Mr.Gandhi want of care on the part of the applicant at the relevant point of time has not been proved by the prosecution. It was urged that merely because the accident had occurred it could not be said that in all cases it is due to the negligent and rashness driving of the vehicle in question.

#. On the other hand, learned APP Mr.Mankad supported both the decisions of lower Court. It was stated that after complainant getting down from the bus in accompany of his son and grandson, was crossing the road from east to west because Hajipara village is situated in the west while the Bus Stand is in the eastern side of the road. When they were passing behind the bus on the road suddenly this tanker involved in the accident, emerged from western portion of the road, and since Mukesh was trying to cross the road the tanker hit Mukesh, who died due to accidental injury. It was urged that in such situation when the road is 23 feet wide applicant could have anticipated that the persons might be crossing the road from getting down the bus, and it was the duty of the present petitioner to drive the vehicle so as not to knock down the pedestrian. It was urged that PW No.1 and PW No.2 and eye witness Kanjibhai in their deposition has amply stated that the tanker was in excessive speed and the petitioner could not control the tanker and ultimately struck with the victim on the right side of the tanker causing injury and resulting in death, therefore, it is urged that the revision application is deserving dismissal.

#. Having considered rival contentions and having taken into consideration the record of the case including the judgment of the trial Court it clearly appears that both the Courts below have placed reliance on the eye witnesses PW No.1 and PW No.2. The learned trial Judge has come to the conclusion, after appreciating the deposition of these two witnesses, that the victim had crossed half of the road and the tanker had knocked him down. The learned Judge has come to the conclusion that from the above evidence it was clear that the applicant was driving the vehicle with excessive speed. The learned trial Judge has said that there is no reason why these two witnesses could not be believed. It was also

stated by the learned Judge that, there is no contradiction regarding the fact of the case and deposition of PW No.1 and PW No.2. It was also stated by the learned JMFC that the road is 23 feet wide wherein two vehicle can easily be passed. It was also taken into consideration by the learned Magistrate that hand brake of the tanker was defective and that is proved by Ex.21 accident report and from that after relying on the decision of Supreme Court in the matter of Syad Akbar vs. State of Karnataka, as reported in AIR 1979 Supreme Court p.1848, and after applying the law of presumption, the learned Judge came to the conclusion that as the hand brake of the tanker was not properly working, the accident could have avoided by applying the hand brake. The learned Appellate Judge endorsed the view of the learned JMFC.

#. The important aspect particularly in such case is whether in the facts and circumstances of the case the prosecution was able to prove rash and negligence in driving of the vehicle by the accused. Whether a person driving a vehicle was or was not rash or negligent always depend upon the question, that what amount of care and caution such person was required to take in the given circumstances. The test of reasonableness of a prudent man has always been applied by the Courts in such circumstances, meaning thereby, what amount of care and circumspection as prudent reasonable man would consider sufficient in the given circumstances. Mere occurring of the accident in all such cases may not lead to only conclusion that the accident has occurred due to want of care and circumspection which the person charged was required to observe. There may be accident pure and simple and the result of the circumstances beyond the control of everybody involved in the accident which might have occurred. If we explain in other word, in criminal prosecution the amount of degree of negligence are the determining factor i.e. to show there must be mens rea in the criminal negligence. To establish mens rea in such cases is to establish the fact that the culprit though had an opportunity and as a reasonable and prudent man could have taken certain care and circumspection, did not take, and the accident was the direct result of such want of care and circumspection. Therefore, merely an occurring of accident may not lead to conclusion that it is due to rash and negligent act of the driver of the vehicle so as to invite punishment under Section 304 (A) and 279 of the Indian Penal Code. Reverting back to the facts and evidence of this case and visualizing the situation when the accident occurred, it is clear that road is 23 feet wide in north and south direction, bus

was on eastern side, otherwise the bus would be on the western side of the road, which was correct side of the bus. But the bus was on the wrong side of the road i.e. eastern portion of the road because the Bus Stand was there. The bus was stationary and according to witnesses about to start. The correct side of the tanker was the western portion of the road. The evidence and the circumstances denotes that to overtake the bus which was stationary the tanker driver must have come to the wrong side of the road, while doing so, he must have reduced his speed. While it was passing from there near the bus at about couple of feet distance from the bus this accident has occurred. The witnesses PW No.1 and PW No.2 have clearly stated that behind the bus after 5 ft. to 6 ft. the father and son Hipabhai and Kanjibhai and Mukesh victim were trying to cross the road and going towards the eastern direction. The witness particularly PW No.1 Hipabhai in his cross examination says that while they were crossing the road they saw the tanker and they stopped themselves on the road. At that time, Mukesh victim who was with his grandfather Hipabhai came running from Kanjibhai on road and during this process this accident has occurred. This version and location of both the vehicle and time of the accident clearly indicates that this is a case of sudden crossing of road by minor, unescorted or not properly escorted by his father and grandfather. The important factor is that what amount of care the present petitioner would have taken. The petitioner undoubtedly was required to take care of when he passes through the bus with a moderate speed so as to avoid any conduct with the pedestrian. Seeing the tanker coming from the northern direction, the complainant and his son Kanjibhai stopped on the road but since the victim was with the Kanjibhai and was coming to Hipabhai running and tried to cross the road running, was knocked down by the tanker. The facts clearly denotes that behind the bus the victim suddenly tried to cross the road running, created the situation in which the petitioner could not have stopped the vehicle then and there, and to bring the stand still halt so as to not to knock down the victim, who was crossing the road running. The fact also goes to suggest that right after 5 ft. to 6 ft. ahead of the spot of the accident the tanker was stopped, denoting that the tanker was not in excessive speed.

#. Therefore, in the facts of the present case, the prosecution was required to prove that the applicant drove the vehicle in a speed which was so excessive that reasonable and prudent man would not drive the vehicle at that speed. The prosecution was further required to

prove that the applicant was able to to see the road fully and noticed in advance the persons crossing the road. The prosecution was also required to prove that, care and caution which a prudent and reasonable person would have observed in the circumstances could have stopped the vehicle at the sudden crossing of the road by victim and could have avoided the accident.

#. In my humble opinion the prosecution though has proved the accident, but has not proved the above mentioned factor, and in these circumstances the benefit of doubt always leans towards the accused that on sudden crossing of road by a victim who is minor aged 5 years was according to evidence of his grand father was running on the road, whether the accused could have or could not have stopped the vehicle irrespective of the speed of the vehicle. If the speed of the vehicle is excessive, one can say that the driver of the vehicle could not have stopped the vehicle at pivotal juncture, that itself may be an act of rash and negligent but the circumstances denotes herein that after the accident the vehicle could be stopped right after 5 ft. to 6 ft. of the spot of the accident and the fact that the father and grandfather of the victim who were alongwith the victim restrained themselves on the road safely so as to pass the vehicle denotes that the speed of the concerned vehicle was not so excessive as to attribute culpable rashness or negligent to the conduct of the accused and if the speed is not excessive then the core question which arises that at the relevant moment whether a prudent and reasonable man would have stopped his vehicle so as to not to come in contact with the victim. It is for the prosecution to prove this positive aspect of the case to the extent that the accused by all reasonable care and circumspection could have avoided the accident. The situation at the time of the accident is half of the road was occupied by the bus and the tanker travels in the next half of the road. A pedestrian PW No.1 and PW No.2 and victim emerges behind the bus after leaving 5 ft. to 6 ft. road in southern direction. PW No.1 and PW No.2 noticed the tanker coming and restrained themselves on the road, while the victim who was running or coming towards his grandfather crossed the road and was knocked down by the tanker. In these circumstances and from the evidence on record it could not be said that beyond reasonable doubt it is proved that the applicant - accused could have stopped the vehicle at that very juncture and could have avoided the accident. Only because the hand brake was disconnected, one cannot come to a conclusion that as the hand brake was properly working, vehicle could have been stopped then and there by applying hand brake. What was

required to be proved by the prosecution was a crucial issue that, in the circumstances, as the hand brake be applied the driver could have avoided the accident while victim was suddenly crossing the road. The law of presumptions that the learned JMFC has applied to the facts of the case would have applied only if the above mentioned primary facts are proved by the prosecution. The Apex Court in the matter of Mahadeo Hari Lokre vs. The State of Maharashtra, as reported in AIR 1972 SC p.221, observed in a case of sudden crossing of the road by the pedestrian and knocked down by the vehicle that if a person suddenly crosses the road the bus driver however slowly he may be driving may not be in position to save the accident because there always remain possibility of the pedestrian dashing against the bus without the driver becoming aware of his crossing, till it was too late. Exactly, it appears that the same is happened in this case that the sudden crossing of a victim has not been noticed by the driver of the tanker more so when the pedestrians were crossing behind the bus which occupied the half of the road and more so when evidence discloses that the victim was not properly escorted by either his father or his grandfather and was coming on the road running and attempted to cross the road. Learned APP has relied upon a decision Duli Chand vs. Delhi Administration, as reported in 1975 Supreme Court 1960, wherein a pedestrian was knocked down by a bus while he was crossing the road. But there in that case there was cross road where accident occurred and the road much wider. In all probabilities therefore in that case the driver must have noticed a pedestrian crosses the road, while in this case the driver of the tanker that is accused - applicant might have or might not have the opportunity to notice sudden crossing of the road of minor victim. This was the fact exactly required to be proved beyond doubt by the prosecution that the circumstances were such that in all probability the driver of the tanker had all opportunity to notice the crossing of pedestrians on the road. Therefore, this benefit of doubt must go to the accused.

##. In this view of the matter, this Revision Application is required to be allowed and the same accordingly is allowed. Judgment and order passed by the learned JMFC in Criminal Case No.96/1988 on 16.5.1991 convicting the present applicant for the offences under Section 279 and 304-A of the Indian Penal Code and awarding imprisonment and fine is set aside. Likewise, the judgment of the learned Additional Sessions Judge, Bhavnagar Camp at Mahuva in Criminal Appeal No.25/1991 which is dated 19.8.2000 is also set aside for the above

stated reasons. Accused - applicant is acquitted for the charges under Section 304-A and 279 of the Indian Penal Code and under Section 112 and 116 of the Bombay Motor Vehicle Accident Act. Fine paid by the accused be returned to the accused. Bail bonds of the accused stands cancelled. Record and proceedings of the trial Court as well as Appellate court be returned to respective Court immediately.

(J.R.VORA, J.)